

Gilbert Prosecutor's Office v. Hon. Foster, No. No. 1 CA-SA 18-0074 (June 7, 2018)

A city prosecutor filed a timely notice of change of judge as a matter of right in city court under Rule 10.2; the notice included the avowals required by Rule 10.2(b). Defense counsel objected that the notice was for an improper purpose under Rule 10.2(b)(2) and requested a hearing. The assigned judge transferred the case to the presiding judge, who set the matter for an evidentiary hearing. The city sought special action review in the superior court. The superior court denied relief, reasoning that an evidentiary hearing was appropriate because the defendant had objected on the ground that the notice was made for an improper purpose under Rule 10.2(b), and the rule "contemplates that the presiding judge should make a determination on the matters of a claim under Rule 10.2 that a notice was improper." Division 1 accepted review, reversed, and remanded for reassignment to a new judge.

- When a party timely files a notice of change of judge as a matter of right under Rule 10.2(b), a court cannot inquire beyond the required avowals into the reasons for the notice; the presiding judge must immediately reassign the case to another judge.

The question presented was whether the 2001 and subsequent changes to Rule 10.2 altered the pre-existing "summary and automatic" nature of a notice of change of judge to allow a court to inquire beyond the required avowals into whether a notice is filed for a proper purpose. Division 1 held that the "summary and automatic" nature of the rule is explicit and continues. The Court noted that ASC carefully crafted Rule 10.2 to avoid judicial involvement in notices, leaving potential sanctions for professional misconduct as the safeguard against misuse. ASC specified the intended interaction between Rule 10.2 and the amendments to ER 8.4, Rule 42, Rules of the Supreme Court to address abuse of Rule 10.2 while preserving the traditional benefits of the right to peremptory change of judge. Thus, if a party or a judge has reason to believe that the rule is being abused, the remedy is to report the abuse to the State Bar. Requiring a party to appear at an evidentiary hearing and explain why she filed the notice eliminates the traditional benefits of the peremptory change of judge, is not expressly or implicitly contemplated by Rule 10.2, and violates the imperative of Rule 10.2(d)(2). Accordingly, upon receipt of a timely and complete notice of change of judge of right, the presiding judge must immediately reassign the action to another judge.

<http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2018/1%20CA-SA%2018-0074%20-%20Gilbert.pdf>